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9 Attorneys for WAYMO LLC

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;  
17 OTTOMOTTO LLC; OTTO TRUCKING LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S LIST OF  
DEFENDANTS' DISCOVERY  
MISCONDUCT**

Judge: The Honorable William Alsup

Trial Date: October 10, 2017

1 Pursuant to the Court's order at the July 26 hearing, Plaintiff Waymo LLC ("Waymo")  
2 submits this list of up to "two dozen acts" of discovery misconduct by Defendants that Waymo may  
3 request be introduced to the jury. (7/26/17 Hearing Tr., 72:11-14.) Because discovery is not yet  
4 complete, the parties await the Federal Circuit's ruling on Waymo's motion to compel production of  
5 the due diligence report and documents responsive to the Stroz subpoena, other discovery issues  
6 remain pending, more misconduct may be identified and/or become more relevant/significant as issues  
7 evolve, this list is not complete and subject to supplementation and amendment.

8 1. Uber was aware that as of March 2016, Levandowski had in his possession five  
9 disks of Google confidential information that he then destroyed. Uber did not disclose that to  
10 Waymo in the litigation until June 5, 2017, despite such information being responsive to at least  
11 the Court's March 16, 2017 order requiring Defendants and their attorneys to disclose any  
12 destruction of downloaded materials that they were aware of by March 31, 2017.

13 2. Uber's counsel did not disclose that, since March 2017, they have had access to  
14 certain downloaded materials through a third-party discovery vendor (Epiq) that they employed to  
15 archive client documents, despite such information being responsive to the Court's March 16  
16 order requiring Defendants and their attorneys to report on and return the downloaded materials by  
17 March 31, as well as the Court's May 11 order requiring the parties to report on and return the  
18 downloaded materials by June 23, 2017. Epiq continues to be Uber's counsel's discovery vendor,  
19 and Uber's counsel continues to have access to the review database.

20 3. Uber's counsel did not disclose the existence of another set of downloaded  
21 materials in their possession until July 12, 2017, despite such information being responsive to the  
22 Court's March 16 order requiring Defendants and their attorneys to report on and return the  
23 downloaded materials by March 31, as well as the Court's May 11 order requiring the parties to  
24 report on and return the downloaded materials by June 23, 2017.

25 4. Uber's vendor (Stroz) has had access to certain downloaded materials since 2016.  
26 Despite such information being responsive to the Court's March 16 order requiring Defendants and  
27 their attorneys to report on and return the downloaded materials by March 31, as well as the  
28 Court's May 11 order requiring the parties to report on and return the downloaded materials by

1 June 23, 2017, Uber did not take steps to cause its vendor to return the downloaded materials.  
2 Stroz continues to work with Uber and its attorneys and is retained by Uber’s counsel to assist in  
3 this litigation.

4 5. As recently, as August 22, two days before the close of discovery, it was revealed  
5 that Uber’s vendor, Stroz, had in its possession “numerous” other devices from the Diligenced  
6 Employees that it never searched (during the “due diligence” process or otherwise) and had never  
7 previously disclosed to Waymo or the Court.

8 6. Defendants did not produce Uber-Otto acquisition documents until they wanted to  
9 affirmatively use them to support arguments made in briefs and then produced them in heavily  
10 redacted form. For example, Defendants redacted key provisions from these documents, such as  
11 Uber’s agreement to indemnify Levandowski and Lior Ron for “Bad Acts.”

12 7. The Court’s May 11 order required Defendants to prepare and serve on Waymo by  
13 June 23 “a complete and chronological log of all oral and written communications . . . wherein  
14 Anthony Levandowski mentioned LiDAR to any officer, director, employee, agent, supplier, or  
15 consultant of defendants.” Uber has violated that order in several respects. For example, Uber has  
16 supplemented its log on four separate occasions: June 27, June 30, July 3, and July 19, with the  
17 number of entries increasing from 561 (in the log provided by the Court’s June 23 deadline) to  
18 1086 (in the log provided on July 19). Since Uber’s most recent supplemental log, Uber has  
19 produced documents showing additional LiDAR-related communications between Mr.  
20 Levandowski and Uber employees that are not disclosed on the log, such as UBER00236495  
21 (11/16/2016 text message from Mr. Levandowski to Eric Meyhofer pertaining to LiDAR,  
22 produced by Uber on August 17) and UBER00301268 (6/21/2016 text message from Mr.  
23 Levandowski to Don Burnette pertaining to LiDAR, produced by Uber on August 23).

24 8. Otto Trucking has also violated the May 11 Order. Otto Trucking supplemented its  
25 log once, on August 18, after being directed to do so at the August 16 hearing on Waymo’s  
26 Motion for an Order to Show Cause.

1           9.       Uber withheld the retainer agreement and side-letter agreements with Stroz as  
2 privileged until Uber affirmatively wanted to use that document to support an argument in one of  
3 its briefs.

4           10.     Defendants withheld the Stroz due diligence report conducted in connection with  
5 the Uber-Otto acquisition, claiming it was privileged without a clear identification thereof in its  
6 privilege log. Waymo has still not obtained a copy of that report.

7           11.     Defendants hid the name of the vendor (Stroz) that conducted the due diligence  
8 investigation until required by the Court to disclose it.

9           12.     Along with the Stroz report, Defendants withheld over 3,000 documents referring  
10 to the downloaded materials as privileged.

11          13.     Defendants' numerous privilege logs have not identified documents with the detail  
12 as required by the Court. Defendants have repeatedly sought to justify privilege claims as logged  
13 with no corresponding support in the privilege logs, which is improper.

14          14.     The Court's May 11 order required Defendants to provide by June 23 a "detailed  
15 accounting under oath setting forth every person who has seen or heard any part of any  
16 downloaded materials, what they saw or heard, when they saw or heard it, and for what purpose."  
17 Defendants violated that order by not providing a complete accounting by that date. Uber has  
18 supplemented its accounting on three separate occasions to address numerous improper omissions:  
19 June 28, July 20, and August 13, with the length of the accounting increasing from 6 pages (in the  
20 accounting provided by the Court's June 23 deadline) to 10 pages (in the accounting provided on  
21 August 13).

22          15.     As of March 29, 2017, Uber purports to be aware that Levandowski downloaded  
23 the "downloaded materials" and subsequently destroyed them, but Uber did not disclose that to  
24 Waymo or the Court until August 4, despite such information being responsive to at least the  
25 Court's March 16 order requiring Defendants and their attorneys to disclose any destruction of  
26 downloaded materials that they were aware of by March 31, 2017, Waymo's Expedited  
27 Interrogatory No. 1, and other discovery.

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1           16.     As of March 29, 2017, Uber purports to be aware that Levandowski downloaded  
2 the “downloaded materials” and his alleged reason for doing so in relation to his bonus, but Uber  
3 did not disclose this theory in the litigation until June 28, despite having a June 21 deadline to  
4 identify witnesses with knowledge relevant to the parties claims and defenses and the Court's  
5 Order to identify Defendants' intentions to waive privilege.

6           17.     On May 11, 2017, the Court ordered Defendants to make available for inspection to  
7 Waymo Defendants’ “ongoing LiDAR work,” including emails. On May 30, Waymo asked to  
8 inspect text messages between Travis Kalanick and Anthony Levandowski. Defendants did not  
9 produce text messages sent from Travis Kalanick to Anthony Levandowski until August 1, and did  
10 not produce more than 12 text messages from Travis Kalanick on that date.

11           18.     Although Uber purports to have anticipated litigation against Google by no later  
12 than February 2016, and Travis Kalanick and Anthony Levandowski frequently corresponded via  
13 text messaging, Travis Kalanick set his text messages to automatically delete after 30 days,  
14 permanently destroying an unknown volume of highly relevant evidence.

15           19.     Although Waymo served an expedited interrogatory on May 22 seeking  
16 information regarding ownership of Tyto LiDAR, Uber did not disclose that Levandowski  
17 (through an elaborate structure of shell companies and trusts, designed to conceal his involvement)  
18 owned and controlled Tyto LiDAR. Tyto LiDAR was acquired by Otto and ultimately Uber.  
19 Uber’s independent development theory as to certain of the asserted trade secrets is based upon  
20 alleged development by Otto engineers who previously worked at Tyto LiDAR, the company that  
21 Mr. Levandowski owned and controlled but whose involvement was concealed by Uber.

22           20.     Defendants produced large volumes of documents on the eve of the close of  
23 discovery, from previously deposed witnesses including Brian McClendon, Eric Meyhofer , and  
24 Don Burnette. Some of these documents appear to be what Defendants contend will corroborate  
25 their theory as to why Levandowski downloaded the “downloaded materials.” Waymo continues  
26 to investigate this issue and meet and confer with Defendants in relation thereto.

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1           21. Defendants claim that Anthony Levandowski refused to cooperate with Uber in this  
2 case, but blocked Waymo's attempts to obtain discovery on the extent of that lack of cooperation  
3 on the basis of privilege.

4           22. Although Anthony Levandowski is a shareholder and member of Otto Trucking,  
5 Otto Trucking refused to search his documents or ask him for information in response to Waymo's  
6 discovery requests, regardless of whether the information sought was incriminating. Yet,  
7 Levandowski has been available to Otto Trucking's counsel to provide guidance on legal strategy  
8 and facts and obtaining evidence. Otto Trucking did not disclose those facts or evidence to  
9 Waymo in a timely manner.

10           23. Otto Trucking's counsel referenced evidence in two depositions this week which  
11 has not been produced to Waymo, and refused to explain to Waymo where Otto Trucking obtained  
12 such evidence. When Waymo pressed for this information, Levandowski's separate counsel  
13 produced text messages on August 24 which make clear that Levandowski obtained the evidence  
14 at issue in late July, but did not disclose it to Waymo and still has not produced it to Waymo.

15  
16 DATED: August 24, 2017

QUINN EMANUEL URQUHART & SULLIVAN, LLP

17 By /s/ David A. Perlson

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19 Attorneys for WAYMO LLC  
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